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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 701

MRS. WANDA MERCER,

Petitioner,

versus

PARIS THERIOT

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 781

MRS. WANDA MERCER,

Petitioner,

versus

PARIS THERIOT

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Your Petitioner, Mrs. Wanda Lane Mercer, prays that this Court grant rehearing of its order of May 4, 1959, denying the Petition for Writ of Certiorari, U.S. , and that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in the above entitled case as prayed for in the petition filed herein March 18, 1959.

Reasons for Granting Rehearing and Issuing the Writ

I

The jury verdict and judgment thereon rendered by the District Court was reversed by the Fifth Circuit Court of Appeals 262 F.2d. 754, for two reasons: that the trial went out of bounds due to errors committed by the trial judge and Petitioner's inflammatory trial tactics, and also because the reviewing court did not feel the evidence was sufficient to sustain the jury's finding for the plaintiff.

The Court of Appeals cited as illustrative of the trial judge's errors, requiring reversal, the fact that defendant objected to a portion of the charge *after* the jury retired, at which time the lower court requested the stenographer's notes to be read; thereafter recalled the jury immediately and reinstructed them after they had been deliberating twenty-five minutes. See Appendix "A", p. 60, Petition for Writ of Certiorari. As was pointed out on page 20 of Petitioner's Petition for Writ of Certiorari, the necessity for reinstruction was a consequence of defendant's counsel failure to register his objection to the charge at the time such objections were elicited by the trial judge before the judge retired. Although respondent denies that he was in any way at fault, the attached transcript of record clearly shows that the trial judge gave counsel an opportunity to suggest that the charge should be clarified *before* the jury retired:

> The Court: The point I'm trying to make is this, that you had the duty to call this part of the charge which you say was unclear, to the Court's attention when you were called up to the Bench after the

charge and while the Jury was still there. Instead of that, you apparently decided that it was better to reserve your point for appeal, and you didn't call it to my attention but you decided to wait a while at the time so that you could get an exception in the record. That is apparently what you did.

Mr. Hughes: I see a notation here on the transcript, "Conference of Court and counsel outside of the hearing of the Jury") but, I don't recall your Honor at that time asking for exceptions to the charge.

The Court: I asked if you had any suggestions as to the charge. I had already indicated to you that I was going to give you a full opportunity to except to the charge after the Jury was retired. We had to go on over to the question of the requested instructions, and I had indicated to you which ones I was going to give and which ones I was going to refuse. You indicated what your exceptions were going to be. That matter was all prepared, so we decided that rather than take up the Jury's time and let them stand out in the hall while Counsel made exceptions to the Court's charge, that we would let the Jury go out and take the exceptions after the Jury went out, it being understood they were being made as before the Jury. *In order to make certain that there were no new exceptions not already indicated in conference, I called counsel up to the Bench while the Jury was still sitting there and asked Counsel whether or not there were any further questions about the charge, and you said you had none. Then, when the Jury was retired is when you came up with this other one.*" (Emphasis supplied). Pages 10 and 11 of attached transcript of record.

Due to an oversight, this portion of the record quoted above and attached hereto, was not included in the record as originally prepared and as filed with the Petition for Writ of Certiorari.

In light of the actual circumstances surrounding the Jury's being recalled, it is submitted that no error can be laid to the trial judge, and that the Fifth Circuit Court of Appeals was without justification in holding that the District Court was inattentive and caused the trial to be dominated by errors requiring reversal.

II

The Fifth Circuit Court of Appeals in reversing the jury verdict as being unsupported by the weight of evidence, and ordering a new trial, denied Petitioner her right to a trial by jury to which she was entitled under the Seventh Amendment. Although appellate review on the weight of evidence is justified on the theory that the trial judge abused his discretion and therefore is a question of law not of fact, such review is against the Seventh Amendment, for if a jury finds the defendant negligent and the appellate court decides that the clear weight of evidence shows him free from negligence, it is re-examining the jury's determination of a factual issue. In two cases decided by this Court, it was held that neither the Supreme Court of the United States nor the Circuit Courts of Appeals had the power to review orders granting or denying motions for a new trial when such review is sought on the alleged ground that the trial court made erroneous findings of fact. In the instant case, the Fifth Circuit Court of Appeals reversed, agreeing with the defendant that his motion for directed verdict and in the alternative for a new trial should have been granted in the belief that the verdict and the judgment were not supported by sufficient evidence. It is sub-

mitted that this decision in the case at bar is contrary to two decisions of this Court, namely, *United States v. Socony-Vacuum Oil Co. (1940)*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129; *United States* v. *Johnson (1946)*, 327 U.S. 106, 66 S.Ct. 464, 90 L.Ed. 562.

In the *Socony-Vacuum* case, Socony-Vacuum, and others were convicted of engaging in an unlawful combination and conspiracy in restraint of trade and commerce in gasoline under an indictment charging violations of the Sherman Anti-Trust Act. The jury found the defendants guilty, but the appellate court reversed, and remanded for new trial; on certiorari brought by the United States the appellate court was reversed and the judgment of the District Court affirmed. The pertinent portions of the opinion written by Mr. Justice Douglas are the following:

"Hence this case falls within the well established rule that neither this Court nor the Circuit Court of Appeals will review the action of a federal trial court in granting or denying a motion for new trial for error of fact, since such action is a matter within the discretion of the trial court. Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 53 S. Ct. 252, 77 L.Ed. 439. Certain exceptions have been noted, such as instances where the trial court has 'erroneously excluded from consideration matters which were appropriate to a decision on the motion.' Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. p. 483, 53 S.Ct. p. 255, 77 L.Ed. 439. But there are no such circumstances here. No iota of evidence has been adduced that the trial court in denying respondents' motions failed to take into consideration the effect of the buying programs on gasoline prices in the Mid-Western area. In fact it seems apparent that the trial court considered that issue and

ruled thereon adversely to respondents. *It concluded in substance that whoever may have been all the members of the conspiracy, there was ample evidence to go to the jury on the nature and effect of these programs.*

Certainly, denial of a motion for new trial on the grounds that the verdict was against the weight of evidence would not be subject to review, Moore v. United States, 150 U.S. 57, 61, 62, 14 S. Ct. 26, 28, 37 L.Ed. 996; J. W. Bishop Co. v. Shelhorse, 4 Cir., 141 F. 643, 648; O'Donnell v. New York Trans. Co., 2 Cir., 187 F. 109, 110" (Emphasis supplied)

United States v. *Socony-Vacuum Oil Co., 310 U.S. at 247, 248; 60 S. Ct. p. 856, 857.*

In *United States* v. *Johnson, supra,* the jury found respondent guilty of wilfully attempting to evade income tax, and two other respondents for aiding and abetting him. The Seventh Circuit Court of Appeals reversed the conviction, the Supreme Court reversed and remanded to the Court of Appeals with instructions; respondents asked the Court of Appeals to remand on grounds of newly discovered evidence which was granted. The trial court considered the affidavits submitted by respondents showing that Goldstein, a government witness, committed perjury, as well as the government's counter-affidavits, and denied the motion for new trial, which judgment was affirmed by the Court of Appeals. The case was remanded since respondents contended that still more new evidence had been found. The trial judge again held that the new affidavits did not show that Goldstein had lied. On appeal, the Circuit Court of Appeals reversed, with one judge dissenting, for the reason that the trial judge erroneously found that Goldstein had not committed per-

jury. In reversing, this Court, through Mr. Justice Black, declared:

> "In our opinion the Circuit Court of Appeals erred. • • • The crucial question before the trial court was one of fact: Did the new evidence show that Goldstein's original testimony was false? • • • The Trial court thus answered the above question in the negative. Two judges of the Circuit Court of Appeals thought that the evidence compelled an affirmative answer. But it is not the province of this Court or the Circuit Court of Appeals to review orders granting or denying motions for a new trial when such review is sought on the alleged ground that the trial court made erroneous findings of fact. Holmgren v. United States, 217 U.S. 509, 30 S.Ct. 588, 54 L.Ed. 861, 19 Ann. Cas. 778; Holt v. United States, 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 1021, 20 Ann. Cas. 1138; Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 481, 53 S.Ct. 256, 254, 77 L.Ed. 439, 443. *While the appellate Court might intervene when the findings of fact are wholly unsupported by evidence, cf. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 247, 60 S. Ct. 811, 855, 84 L. Ed. 1129, 1180; Glasser v. United States, 315 U.S. 60, 87, 62 S. Ct. 457, 487, 86 L.Ed. 680, 708, it should never do so where it does not clearly appear that the findings are not supported by any evidence.*

The trial judge's findings were supported by evidence. He had conducted the original trial and had watched the case against Johnson and the other respondents unfold from day to day. Consequently the trial judge was exceptionally qualified to pass on the affidavits. The record of both the original trial and the proceedings on the motions for new trial shows clearly that the

trial judge gave the numerous elements of the controversy careful and honest consideration. (Emphasis supplied)."

United States v. *Johnson, 327 U.S. 111-112, 66 S.Ct. 466.*

From a reading of the record as originally submitted with the Petition for Writ of Certiorari and the attached transcript of record filed herewith, it may be seen that the trial judge in the instant case, as in the two above cited cases, gave the matter of sufficient evidence to support the verdict due consideration and decided against the defendant's contention that such was lacking. Therefore, it is not within the Fifth Circuit Court of Appeals' power to reverse the trial judge in his determination on this factual issue, and the judgment of the District Court should be reinstated.

Conclusion

Petitioner has shown that both of the grounds for which the Fifth Circuit Court of Appeals reversed the judgment below are without merit. First, through the Petition for Writ of Certiorari, it was pointed out that the trial did not go out of bounds, and that the trial judge did not commit errors denying defendant a fair trial. Petitioner reaffirms this fact by submitting to this Court at this time, a transcript of record not formerly made a part of the record, proving that one of the errors attributed to the trial judge was manifestly the fault of the defendant. This Court's attention is invited to the portions of the Petition for Writ of Certiorari, pages 9-28, in which Petitioner shows that all of the errors cited by the Court of Appeals were without basis in fact.

As for the reviewing court's reversal due to insuf-

ficiency of evidence, it is beyond question that this action violates the quaranty of a jury trial embodied in the Seventh Amendment, since in so doing, the Court of Appeals re-examines the facts. This is true despite the fact such an examination is termed a question of law and a determination of whether or not the trial court abused his discretion in failing to grant the motion for directed verdict and in the alternative, for a new trial. This Court has long been the protector of the trial by jury despite the growing review powers assumed by the appellate courts, e.g., the numerous cases cited in the Petition for Writ of Certiorari, page 50, wherein this Court has reversed the Circuit Court of Appeals, and affirmed the jury verdict returned in the District Court. Petitioner believes that a denial of the Petition for Writ of Certiorari in the case at bar wars against all these decisions safeguarding the ancient right to trial by jury. If litigants are not to be afforded the provisions of the Seventh Amendment, it is submitted that it falls within the legislative sphere to deny the citizens of the United States this time-honored right; the courts are not empowered to abrogate such a quaranty through judicial mandate.

In conclusion, reference is made to the recent decision, *Dick v. New York Life Insurance*, U.S. , handed down on May 18, 1959, in which a jury award of double indemnity benefits was upheld, and the Court of Appeals reversal thereof was overturned. Mr. Justice Frankfurter in his dissent, voiced criticism of the Court for its consideration of this case, since he felt that it had importance only to the litigants, and there was no special or important reason for bringing the case to the Supreme Court. Petitioner submits that the case at bar does present this court with a question of far-reaching impor-

tance,—should the right to trial by jury be extinguished by improper appellate review of factual issues.

WHEREFORE, for the reasons set forth above and in the Petition for Writ of Certiorari, it is respectfully urged that rehearing be granted and that the Court withdraw its order of May 4, 1959, refusing the Petition for Writ of Certiorari herein, and that the Court issue a Writ of Certiorari to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

WARREN E. MILLER,
Suite 1012, Barr Building,
910 Seventeenth Street N. W.,
Washington, D. C.;

H. ALVA BRUMFIELD,
205 American Bank Building,
Baton Rouge, Louisiana,

Attorneys for Mrs. Wanda Mercer,
Petitioner.

Certificate of Counsel

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

WARREN E. MILLER,
Attorney for Petitioner.

Proof of Service

I, Warren E. Miller, attorney for petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing Petition for Writ of Certiorari on Robert G. Hughes, counsel for respondent, by mailing a copy thereof, postage prepaid, addressed to his office at 1702 American Bank Building, New Orleans 12, Louisiana.

Dated this 29th day of May, 1959.

WARREN E. MILLER,
Attorney for Petitioner.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA NEW ORLEANS DIVISION

Civil Action No. 6072

MRS. WANDA MERCER,

versus

PARIS THERIOT

ON MOTION OF DEFENDANT FOR JUDGMENT IN ACCORDANCE WITH PREVIOUS MOTION FOR A DIRECTED VERDICT, AND ALTERNATIVELY FOR A NEW TRIAL.

APPEARANCES:

H. ALVA BRUMFIELD, Esq. 352 Florida Avenue, Baton Rouge, Louisiana. Attorney for Plaintiff.

ROBERT G. HUGHES, Esq. AMERICAN BANK BUILDING, New Orleans, Louisiana. Attorney for Defendant.

(The above entitled and numbered matter came up for hearing on this, the 18th day of December, 1957, in the Courtroom, United States Post Office Building, New Orleans, Louisiana; The HONORABLE J. SKELLY WRIGHT, District Judge, presiding.)

. . . . . .

PROCEEDINGS

The Court: Number 6072, Mrs. Wanda Mercer versus Paris Theriot.

Mr. Hughes: If your Honor please, certainly your Honor recalls the trial of this case, and you have read the memoranda, the points made, so I will be as brief as I possibly can.

I would like to read to your Honor from American Jurisprudence, Section 1189, on direct and circumstantial evidence, a portion of which is quoted in Defendant's memo.

The Court: How long is that?

Mr. Hughes: It's very short.

The Court: Proceed.

Mr. Hughes: "to establish a theory by circumstantial evidence the known facts relied upon as a basis for the theory must be of such nature and so related to each other that the only reasonable conclusion to be drawn therefrom is the theory sought to be established—" the only reasonable conclusion. "A fact is not proved by circumstances if they are merely consistent with its existence, or if other inferences may reasonably be drawn from the facts in evidence."

If the Court pleases, that is the basis of my argument to you. On the submission of this case to the Jury the only established facts were that about 7:00 o'clock the decedent left the place where he was; the same day, about 7:45, the Defendant left his place. And, the next morning about 6:30 the decedent was found dead on the side of the road. There was absolutely no evidence that the decedent was walking along that road. The Jury had to infer and conclude from the time these two parties left the respective places where they were, that they met on this roadway and the decedent was walking on the roadway.

Now, to connect it there was damage shown to the front of the Defendant's automobile. The fact that the Jury disbelieves that it was there before the accident, is unimportant. The Jury has a right to do that. There was no connection shown between the damage and the injury which the decedent suffered. There was no testimony presented to this Court that the injuries which the decedent suffered resulted from being struck by an automobile. Not one iota of evidence in this record upon expert or otherwise.

There was no evidence as to the time this accident occurred. As a matter of fact, the evidence was contra-

dictory. If your Honor recalls, the decedent left his place on December 18th, at 7:00; the Defendant, his place at 7:45 on December 18th. The three exhibits introduced in evidence by the Plaintiff shows, one, the time of death at about 7:15 P.M. on December 18th—that's half an hour before the defendant left the restaurant-bar where he was. Then two show "December 19th." The Defendant was not at Grand Isle on December 19th, so there is confusion as to the date and time that this man died.

The so-called hair under the car, the testimony was, or the fact is that it was not identified as hair—it looked like it. Whether it was animal hair or human hair was never established. If human hair, if it came from the decedent's head, was never established. It could have been threads. It could have been grass, and that testimony was there.

Now, the Jury obviously concluded that it was hair and hair from the decedent's body. That does not exclude the possibility that it was something other than hair, or if it was hair, that it was from some other body other than the decedent's body.

The blue spots on top of the car, and the hair underneath the car—there was absolutely no connection as to the color, except "blue". The decedent's clothes were blue, and back under the hood there was a blue spot. There was never any proof shown or evidence that the clothes which the decedent was wearing at the time would rub off or whether it came into contact with something else. There was no identification between that spot as to color, dark blue, light blue, and the color of the decedent's clothing, as well the fact that the decedent's clothing could fade.

So if the Court pleases, from a factual standpoint, in order to arrive at the verdict which the Jury arrived at, they had to start with the fact that the decedent was on Grand Isle at 7:00 o'clock, and they don't know where he was after that. The Defendant left there at 7:45, and he went home. There was testimony to that in Golden Meadow and from those established facts, all of the rest of this had to be concluded, and what actually happened was that the Jury found, fact from

inferences, and found fact from supposition, and on the basis of supposition and on the basis of eliminating this which was just as probable as that, the Jury found that, and followed it through to the limit.

I say that to the Court because this case is before your Honor now. There is no Jury here and we are talking about law, the sufficiency of evidence to submit the case to the Jury. And, it is the Defendant's belief that we just have to assume facts to justify the submission of this case to the Jury. In the first paragraph "the Defendant states," at least, "Counsel for the Defendant have suggested that during the trial of this case no facts were established except that decedent and Defendant were on the road at approximately the same time." That was positively not established. There was no evidence in this record as to what the decedent did after he left the place at 7:00 o'clock, whether he left in an automobile or whether he stayed at Grand Isle, or where he was going or how he was going. There was no testimony to put him walking along that road. That is the first assumption of fact.

Photographs were also taken and used to show the tire marks. Certainly they were taken to show tire marks, and they were introduced in evidence, but those tire marks were never identified with the Defendant's automobile. The Defendant travels that highway all the way from the Fishermen's Bar & Restaurant to Golden Meadow, but that creates no presumption, those tracks or any tracks along the shoulder of that highway, that they were caused by the Defendant's automobile.

And, "Competent testimony was offered to show that substance, evidently blood and hair, were found by investigating officers on the automobile." I don't recall any testimony of blood being found anywhere on that automobile. I remember a bloody rag inside the car somewhere, but I don't know what connection it has, or what it was, and it was never shown, but in so far as blood on the automobile is concerned, there was absolutely no evidence of that.

It was uncontradicted that blue trousers were worn by the decedent on the night of the occurrence. Blue dye was located on the damaged automobile shortly after. I recall a blue spot, but I don't recall the identity of the blue dye. So I say to the Court that all of these things had to be assumed. Plaintiff had to assume them in arguing this motion, assume as facts things which may be true or may not be true, but it is equally probable they are untrue as they are that they are true. But, if I admit all that, if I admit for the sake of argument only that the Defendant was driving the automobile on the roadway, that the decedent was walking along the roadway, and we must remember that that wasn't proved, and that the decedent was hit by the Defendant's automobile, then, if the Court please, the Plaintiff had to show negligence. There had to be some evidence of negligence.

I cited in my supplemental memorandum this recent case of the Supreme Court of Louisiana, Hawkins versus State Farm Mutual Insurance Company in the November 14th Advance Sheets in which the Court, referring to the Court of Appeals, and in this case a car traveled one hundred some odd feet on its side of the highway, on the shoulder, crossed the highway diagonally and ran down the shoulder over to the other side, flipped end over end into a ditch. The Court of Appeals found the driver was negligent. The Supreme Court says, however, that there is nothing to show what caused this car to leave the pavement. It may have been forced off of the narrow road or highway by oncoming traffic, or a speeding motorist alongside, and the fact of his having driven over to the adjacent shoulder does not of itself warrant an inference of negligence, since it does not exclude other reasonable hypotheses, and that, if the Court pleases, is, of course, the crux of the case on negligence. There has to be some showing of negligence.

The Supreme Court held in this same case that the application of the doctrine of res ipsa loquitur does not relieve the Plaintiff of making a showing of negligence. In this case there was absolutely no evidence presented to the Court that there was any negligence at all on the part of the driver of this automobile, and, of course, the only

evidence was testimony of one of the Terrebonne's driving behind him, which the Jury could believe or disbelieve. But if they disbelieved that the Defendant was driving properly, that did not establish the fact that he was driving improperly.

So I say to the Court that assuming all of the facts that the Jury had to assume to reach the verdict, that there is still no proof of negligence. There is no evidence of negligence, and there wasn't such evidence to submit the case to the Jury.

On the instructions, if the Court pleases, I don't intend to argue very much, very long, on that. I do want to point out, if your Honor will recall, that the Jury before they were empaneled and sworn were asked about circumstantial evidence. I don't think that the Jury in this case ever realized that circumstantial evidence had to be based on established fact, that circumstantial evidence could not be based on an inference, that you couldn't infer a premise and go from there to infer another. And, that is exactly what happened, what stopped my case, that coupled with the instructions that the Plaintiff had made out a case under circumstantial evidence, was highly detrimental to the Defendant. That is a matter within your Honor's discretion, and your Honor is familiar——

The Court: The Court did instruct the Jury, in fact the doubt with reference to what the Court's instruction was, was cleared up as soon as it was possible to check with the reporter.

Mr. Hughes: But the Jury had been out deliberating about half an hour by then.

The Court: Further, if there was such a suggestion that you wanted the Court to clarify, you should have stated that when you were asked.

Mr. Hughes: I excepted to the oral charge.

The Court: You didn't except when you were called up to the Bench to determine whether or not there was any matter that needed clarification to the Jury. You said there was none. After the Jury went [illegible]hen you began talking about that the Jury might not have understood this statement about prima facie.

Mr. Hughes: When the time came to except to the charge, I excepted. However, in this Court your Honor has the right and the authority to do what you please, and I don't think it is necessary that I except, as far as your Honor is concerned, on a motion for a new trial. It may be that upstairs I have to argue whether or not I reserved my rights.

The Court: The point I'm trying to make is this, that you had the duty to call this part of the charge which you say was unclear, to the Court's attention when you were called up to the Bench after the charge and while the Jury was still there. Instead of that, you apparently decided that it was better to reserve your point for appeal, and you didn't call it to my attention but you decided to wait a while at the time so that you could get an exception in the record. That is apparently what you did.

Mr. Hughes: I see a notation here on the transcript, ("Conference of Court and Counsel outside of the hearing of the Jury.") But, I don't recall your Honor at that time asking for exceptions to the charge.

The Court: I asked if you had any suggestions as to the charge. I had already indicated to you that I was going to give you a full opportunity to except to the charge after the jury was retired. We had to go on over to the question of the requested instructions, and I had indicated to you which ones I was going to give and which ones I was going to refuse. You indicated what your exceptions were going to be. That matter was all prepared, so we decided that rather than take up the Jury's time and let them stand out in the hall while Counsel made exceptions to the Court's charge, that we would let the Jury go out and take the exceptions after the Jury went out, it being understood they were being made as before the Jury. In order to make certain that there were no new exceptions not already indicated in conference, I called Counsel up to the Bench while the Jury was still sitting there and asked Counsel whether or not there were any further questions about the charge, and you said you had none. Then, when the Jury was retired is when you came up with this other one.

Mr. Hughes: I don't recall it, your Honor, but wasn't that additional charges? I don't recall I had an opportunity to except before I did except. I can assure the Court that I had no idea of appealing in my mind because I would have much preferred the Jury to go out without that charge. But my understanding was, and I could be incorrect, that I did not have an opportunity at that time to except—I may have been able to suggest some additional charge, but no exceptions to the charge.

The Court: You suggested a clarification that you did suggest after the Jury was retired. And the clarification to the Jury was given after you suggested it?

Mr. Hughes: I did not understand that. I didn't understand that at that time I——

The Court: That is the purpose of the conference. You may not have understood.

Mr. Hughes: I would certainly have clarified it before the jury retired.

The Court: Do you have any other point?

Mr. Hughes: No other point except quantum, which I submit, your Honor is familiar with.

The Court: I will hear from the other side.

Mr. Brumfield: May it please your Honor, if there ever was a case that was proven by circumstantial evidence, it was this case. You take the physical facts as proved by the photographs, which was some evidence that was not destroyed mysteriously as the other evidence was, and the testimony of the driver of that automobile, that in itself was sufficient, without all of this other contradictory statements of the Defendant. You add it all up, and that is where the circumstantial evidence comes in. Then it is a question as to whether or not the Jury was reasonable in making inferences from the evidence that was adduced at the trial. That is the point. And, there is no way that it could be successfully contended, it is our position, that this Jury was unreasonable in reaching the conclusion that it did. Because, as pointed out by the Supreme Court of the United States in the Schultz case, that is the very function of the Jury. The very function of the circumstantial evidence in many instances, that very evidence

and direct evidence that fits the pattern in making reasonable inference from the evidence that it is adduced. And it also fits in in this case like a glove, may it please your Honor, and we submit that the Jury's verdict was correct and it should be allowed to stand by this Honorable Court.

The Court: I will mark the matter submitted.

• • • • • • • •

REPORTER'S CERTIFICATE

The undersigned certifies, in his capacity of Official Court Reporter for the United States District Court, Eastern District of Louisiana, the foregoing to be a true and correct transcription of his Stenograph notes taken during the proceedings in the above-numbered and titled case on the 18th day of December, 1957.

New Orleans, Louisiana, this 30th day of April, 1959.

VIDAL G. APODACA,
Official Court Reporter.

(5820-6)